IN THE

Supreme Court of the United States

NO. 894 [redacted]40

OCTOBER TERM, 1922.

UNITED STATES OF AMERICA,

Petitioner,

vs.

GULF REFINING COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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The respondent, Gulf Refining Company, respectfully submits the following opposition to the petition for writ of certiorari filed by United States of America, petitioner:

I.

This Court is without jurisdiction to grant the writ prayed for, because the case is a criminal case in which the judgment of the Circuit Court of Appeals is in favor of the defendant.

It is settled by this Court that in such case the writ of certiorari will not issue.

United States v. *Dickinson, 213 U. S. 92.*
United States v. *Evans, 213 U. S. 297.*

II.

The indictment in this case charges the Gulf Refining Company with having received concessions and discriminations in rates on the shipment of gasoline from Oklahoma points to Texas in violation of Section 1 of the Elkins Act.

No violation of any other provision of law was charged, and no reference was made in the indictment to the Transportation of Explosives Act or any other criminal provision except the one mentioned.

The evidence showed without contradiction that the defendant paid the rate regularly established by the railroad companies and filed with the Interstate Commerce Commission expressly to cover the movement of the traffic in question (*Record, pp. 559-566, 567-574*) under the name "unrefined naptha", which description originated with the carriers several years previously in deference to an order of the Commission directing them to establish a proper designation for a similar material then without other description, in a case with which respondent had nothing to do (*Record, pp. 567-574, 694; Ex. 99; Record, pp. 1378-1383*). It also shows that the representatives of the Bureau of Explosives knew of these shipments and of the name that was being used (*Record, pp. 179-182, 408-416, 429-440*).

All of the evidence showed that the product shipped as "unrefined naphtha" was naptha, and that it was being shipped to Port Arthur not to be put upon the market as "gasoline" until blended or further processed. If the product was naptha and had to be sent to the refinery to be prepared for market, it was of course properly called in the tariff "unrefined naptha". The evidence (as held by the Circuit Court of Appeals) was that the product shipped was not proper for use as commercial "gasoline" and should not be so called. Indeed, it would be a criminal offense under the laws of Texas to ship or sell it as gasoline. It was even admitted by the Government's own expert witness that the material is properly embraced within the generic name "naptha", and that it was in an unfinished state requiring correction of its boiling points before it would become the material known and sold as "gasoline" (*Record, pp. 883-892*).

A verdict for defendant should have been directed, as held by the Circuit Court of Appeals: that the general verdict against the defendant was induced by manifest errors of the trial is so clear that the application for writ of certiorari does not refer to any one of the issues tried in the District Court or argued in the Circuit Court of Appeals.

The statement on page 4 of the petition for the writ, to the effect that the rates on unrefined naptha being open to respondent's competitors, if properly applicable, were nevertheless not used by the competitor, is misleading; because it fails to add that when respondent's competitor learned of the existence of the rate it filed suit to recover the overcharge exacted of it, evidence of which was of-

fered by respondent on the trial, but excluded, and was assigned, argued and found as error by the Circuit Court of Appeals *(284 Fed. Rep. 90, 102)*.

The next statement in the petition (page 4), that respondent's subsidiary continued to use the description "gasoline" in shipping to other points, is misleading; because it fails to state that there were no "unrefined naptha" rates available to such other points; thus rendering such evidence irrelevant, and its admission was assigned and argued as error, and so found by the Circuit Court of Appeals *(284 Fed. Rep. 90, 102)*.

The application for the writ is based almost entirely on what is called the "remarkable" conduct of the Circuit Court of Appeals in not discussing defendant's assumed violation of a law for which it was not indicted. If the court had given consideration to a matter so entirely foreign to the case, it would perhaps have been content to refer to the Government's appendix to its brief in the Circuit Court of Appeals, wherein it is stated (p. 6):

> "(The Government admits that the cars shipped from Jenks and Kiefer were properly placarded to comply with the regulations.)" with reference to explosives. "(Also that the bills of lading bore a stamp stating that the dome placards had been applied *throughout the period of time covered).* (The Government admits that the dome placards are necessary only when the tank cars contain any admixture of casinghead gasoline with other petroleum products, or casinghead gasoline alone; and also admits that they were not used contrary to the regulations; and that the dome

> cover placards are required only on casinghead gasoline or an admixture containing casinghead gasoline)" *(Record, p. 229, 230).*

Further, if the Court had given consideration to the matter, doubtless it would have abstained from doing that which the representatives of the Government have done in this application. It would not have gone entirely out of the record and appealed to the records of the Bureau of Safe Transportation to prove that the product which the law permits the defendant to transport, and which the Government admits was transported according to law, is more destructive than dynamite; and to secure the details of accidents in Tennessee and Oklahoma with which defendant was not connected, and of another in Texas placarded in accordance with the requirements of the Interstate Commerce Commission.

Nor would the Circuit Court of Appeals have failed in its duty to properly apply the law of this case even if the effect had been to "nullify" the law as to explosives, which the Government in its brief admits was neither nullified nor violated.

The obvious purpose of the statements contained on pages 4 and 5 of the petition for the writ, concerning these accidents, is to convey to this Court the impression that respondent's course was responsible for or had a tendency to cause the accidents cited. Nothing could be further from the truth. As above pointed out, the Government admitted, and respondent also independently proved, that the safety regulations, as such, were strictly complied with by respondent. On the other

hand, the accidents mentioned at Memphis and Ardmore, in which a number of people were killed, were not with respect to shipments of respondent's, but, on the contrary, were with respect to shipments of others, *described as the Government claims they ought to have been.* And as to the accident at Gainesville, Texas, which was respondent's, the evidence taken in a joint investigation by the county authorities and the Bureau of Explosives showed conclusively that the man who caused the accident was not only not misled by the billing, but, on the contrary, had never even seen the way-bill, and, furthermore, that he caused the accident by intentional disobedience of the instructions on the car prescribed by the Bureau of Safe Transportation.

As above stated, none of this matter is any part of the record in the case, but the allusion to it by the Government, with the inferences sought to be conveyed, is characteristic of the tactics by which its representatives succeeded in obtaining a conviction in the District Court.

The Government thinks further that it was remarkable that the Circuit Court of Appeals "does not mention" Rule 44 of the Western Classification, "though such tariff provisions appear in full in the record." If the Circuit Court of Appeals had "even mentioned" all the improper evidence that was admitted upon the trial, the opinion would have been very tiresomely long, without being in any way improved.

During the time in question there was a divergence between the description to be used for safe transportation purposes, as prescribed by such regulations which are published in the Western Classification, and the de-

scription for rate purposes published in the commodity tariff applicable to the shipments.

In this case the Government is now attempting to claim, because the description required for *safety purposes* takes a higher rate than that prescribed for *rate purposes*, that it, the safety description, determines the rate legally applicable. It would be the first to claim the opposite if the situation was reversed.

The statement of the application that there was evidence

> "showing that the respondent had obtained the publication of these rates on unrefined naptha by misrepresentation and by concealing the fact that it was intended to ship these condensates under that description, contrary both to the Commission's regulations and to the carriers tariffs",

is a gross perversion of the record, which shows that the rate was secured with full knowledge that it was to be applied to the product of the casinghead plants intended to be shipped for further refining *(Record, pp. 559-576, 692, 693)*; and that with the knowledge of the railroads and the employees of the Government it was so shipped for more than two years *(Record, pp. 179-182, 408-416, 429-440, 550-557)*.

The statement made in argument on page 6 of the petition, that gasoline rates have been expressly held reasonable as applied to such condensates, in the case of *Southern Carbon Co.* v. *A. & L. M. Ry. Co., 62 I. C. C. 733*, and the statement on page 8 that their "designation as gasoline" had been prescribed in that case by the Interstate Commerce Commission for rating, are directly contrary to the fact.

As will be seen by reference to that case (*62 I. C. C. 734, 735*), the product there in issue was an absorption-process gasoline, and the question was whether it should be described as "gasoline" or "liquefied petroleum gas". There were no "unrefined naptha" rates in issue, and the propriety of such a description was not even considered. There is nothing whatever in that case to indicate the degree of blend involved which would be absolutely controlling as to whether that material could ever be appropriately called "unrefined naptha".

The statement contained on page 8 of the petition, to the effect that it was admitted by respondent's expert that the condensates in issue were popularly known as gasoline, is also quite misleading. For this same expert (*Record, p. 694*) coupled that statement with the further statement that it was not a correct description, and that in a bulletin issued by the Bureau of Mines, of which he was the author, written more than two years before the incidents in issue, which was offered in evidence, he there stated that the name "gasoline" was very loosely applied and that this material was not in fact gasoline (*Record, p. 694*).

It is not conceived that this Court can be influenced by the Government's suggestion that unless this unwarranted criminal action against defendant is sustained the Government may lose in a civil action to which it is a party.

The suggestion is that the Government should be allowed to do a wrong in this case in order to help it to a further wrong in another case.

The application adds to the record, perverts the facts, makes untenable propositions of law, and asks the Court to take action based upon unworthy and immoral considerations, and should be denied.

April 26, 1923.

Respectfully submitted,
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